IMPOSSIBILITY OF PERFORMANCE, AS AN EXCUSE FOR BREACH OF CONTRACT.

IN a recent New York case, Buffalo and Lancaster Land Company *v.* Bellevue Land and Improvement Company[1], the Court of Appeals has held that under a contract to construct an electric street railway and run electric cars thereon "as often as once every half hour from seven A. M. to eight P. M. each day, as such street railroads are usually run," a failure on account of heavy snow storms and high winds to run cars at the required intervals during the whole or a substantial part of the period of four months, was excusable, and therefore did not justify the rescission of the contract. The decision is a somewhat novel one, and has served to call attention to the fact that there is considerable judicial uncertainty in the application of the rules with reference to subsequently arising impossibility as an excuse for failure to perform a contractual duty.[2]

The general rule, that impossibility of performance arising subsequently to the formation of the contract does not excuse the contractor was established in the early case of Paradine *v.* Jane,[3] where it is declared that "where the law creates a duty or charge and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him. * * * But where the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, *because he might have provided against it by his contract.*" To this rule three exceptions have long been recognized: First, where legal impossibility arises from a change in the law. Second, where a specific thing the continuation of which is essential to the performance of the contract is destroyed. Third, where under a contract which has for its object the

[1] 165 N. Y. 247.

[2] See 15 Harv. L. Rev., note on p. 63.

[3] Aleyn, 26 (1178).

rendering of personal service, the promisor dies or becomes physically incapacitated.[1]

The first of these exceptive rules has no reference to the intention of the parties, but is based solely upon considerations of public policy. The second and third, on the contrary, rest on the theory of a condition implied in the contract, and have been adopted with the avowed purpose of giving effect to the will of the parties to the contract. The first rule seems to have been uniformly applied without question and with little difficulty, but an examination of the cases arising under the second and third reveals a pronounced tendency to extend their limits—or rather to apply the theory of an implied condition excusing failure to perform in cases other than those enumerated. The case of Buffalo and Lancaster Land Company *v.* Bellevue Land and Improvement Company,[2] to which reference has already been made, is a striking illustration. The subject matter of the contract—the street railway—was not destroyed. It simply became impossible to operate it according to the distinct and unqualified terms of the contract because of unusually severe winter weather—obviously, a case not within the original bounds of the second rule. And there are many other cases in which departure from the rules is equally pronounced.

This being the situation, two questions present themselves: First, Do the second and third rules, as stated, comprehend all of the cases in which, upon principle, a condition ought to be implied? Second, If not, what extension or modification of those rules should be made? The first inquiry, as is intimated, may be answered without hesitation in the negative. There are a number of cases in which, while the parties are not physically incapacitated and there is no destruction of a specific thing essential to the performance of the contract, such performance becomes impossible by reason of a contingency arising without fault of either party which should clearly operate as a discharge. Thus, in Howell *v.* Coupland,[3] the defendant, in March, agreed to sell to plaintiff two hundred tons of regent

[1] Anson on Contracts, Ninth Edition, pp. 333-4.

[2] *Supra.*

[3] 1 Q. B. D. 258.

potatoes *grown on land belonging to defendant in Whaplode*, at a specified rate per ton, to be delivered in September and October and paid for as taken away. In March the defendant had sixty-eight acres ready for potatoes, which were afterwards sown and were amply sufficient to have grown more than two hundred tons in an ordinary season; but in August, without any default in defendant, a disease attacked the crop and defendant was able to deliver only about eighty tons, the rest of the crop having perished. If the defendant had possessed other land to plant with potatoes, at the time when the disease was discovered, which in fact he did not, it would have been too late to sow it. In an action to recover damages for the non-delivery of the residue of the two hundred tons, it was held that the contract contained an implied condition that the potatoes should be in existence when the time came for performance and that the failure to deliver was therefore excused. Said Cleasby, B.: "Here there was not an absolute contract to deliver two hundred tons of potatoes in September and October, but two hundred tons of potatoes grown on particular land. * * * The crop on this particular land has failed and there is nothing to which the promise can apply. If the crop had existed at the time of the contract and had afterwards failed, there can be no doubt that the principle of the decided cases would apply and the defendant would be excused; and I cannot see any difference in principle from the fact that the crop had not been sown at the date of the contract."

Again, in Dolan *v.* Rodgers,[1] it appeared that the defendant, a contractor under a railway construction contract which provided that contractors would not be allowed to subcontract any part of the work without consent of the railway company, sublet a part of the work to the plaintiff's firm at a stipulated rate, without consent of the company. Both parties to the subcontract were aware of the provision in the contract with the railway company and of the fact that the consent of the railway company had not been given. The plaintiff's firm performed part of the work required by their contract, but was prevented from completing it by the railway company, and in an action to

[1] 149 N. Y. 489.

recover a balance alleged to be due on the subcontract, the defendant claimed that the plaintiff should not be allowed to recover but should pay damages for not completing performance of his contract. The Court held for the plaintiff, declaring that the failure of his firm to perform the contract was excusable. "We think," said Vann, J., "that as both parties had in view the contingency that performance might not be permitted by the railroad company, it was an implied part of their contract that if such were the result, both were to be released as to the future, but bound as to the past." [1]

The justice of these decisions does not appear to be open to serious doubt, and consequently it is believed that they should be supported. We are therefore brought to the second inquiry: What extension or modification of the rules should be made? Perhaps the natural impulse, even after a study of the cases, is to assert that, upon principle, a condition excusing performance should be implied in every case in which the parties, if their attention had been called to the contingency would probably, as reasonable men, have made it an excuse by express terms of the contract. Such a rule would certainly find support in some of the authorities and its application would probably lead to equitable results in a very large proportion of cases. On the other hand, however, it is open to the very grave objection that it would open wide the door of escape from the express terms of contractual obligation. It is the recognized policy of the law that men, in their ordinary dealings, act with their eyes open and that they do not enter into a contract without having duly weighed the consequences which may follow. The responsibility, therefore, rests upon a contractor to anticipate and guard against difficulties, and provide for such contingencies as are likely to intervene. And to empower a court, in every case in which the enforcement of the express terms of a contract would, on account of subsequently arising impossibility, result in hardship, to assume that had the attention of the parties been called to the contingency it would have been provided for, and to act upon the fiction that it impliedly was provided for, is simply to enable it to make a contract for the parties very

[1] See also Lorillard *v.* Clyde, 142 N. Y. 456.

different from that which the parties had made for themselves.

The great importance of guarding, so far as possible against such a result, is obvious. And it is believed, therefore, that a more restrictive rule must be found. With that end in view, the following is suggested: *If the contingency which makes the contract impossible of performance is such that the parties to the contract, had they actually contemplated it, would probably have regarded it as so obviously terminating the obligation as not to require expression, failure of performance should be excused.* In other words, the proper inquiry is not: Would the parties, as reasonable men, if their attention had been called to the contingency, have provided for it in their contract? That, as has been said, would be making a contract for them different from that which they had actually made for themselves. But: Would the parties, had their attention been called to the contingency, have thought it unnecessary to provide for it in the contract? That is not altering or adding to the contract, but merely construing it, as already made by the parties.

This proposition does not appear to have been consciously recognized as a test in any of the adjudged cases. But let us apply it to some of the more important decisions and see what will be the result. The many cases involving loss or destruction of the subject-matter of the contract fall very readily within it. Thus, in the frequently cited case of Dexter *v.* Norton,[1] in which certain bales of cotton which defendant had contracted to sell to plaintiff were accidentally destroyed by fire without the fault or negligence of the defendant, the Court, in holding the defendant to be excused, might well have said, not merely that the parties are presumed to have contemplated the continued existence of the cotton, but that it was so obvious that the obligation to perform depended upon the continued existence of the cotton that provision for the contingency could not reasonably be expected. In other words, had the defendant referred to the fact that performance might be prevented by the destruction of the cotton, it would have been so obvious that such destruction would excuse the defendant that it would not have been thought necessary by them, as reason-

[1] 47 N. Y. 62.

able men, to so provide in the contract. The same is true of the equally well-known English case of Taylor *v.* Caldwell,[1] where A agreed with B to give him the use of a music hall on specified days, for the purpose of holding concerts, and before the time arrived the building was accidentally burned. The continued existence of the hall was so obviously a condition of the obligation that its expression would have appeared to the parties to be entirely superfluous.

The cases falling under the third of the old exceptive rules—those in which one who has contracted to perform personal services dies or becomes physically incapacitated—are so readily seen to be included within the proposed substitute that discussion of them is unnecessary. A contract of that nature would be regarded by every reasonable man as one the obligation of which would be terminated by death or incapacitating illness of the contractor, and the inference is so plain that to expressly provide for it in the contract would seem to him to be utterly needless.

Turning to cases which are clearly beyond the bounds of the old rules, and in the decision of which the courts have shown some uncertainty, it is found that the proposed test might have been applied without serious difficulty and with harmonious and generally equitable results. In Dolan *v.* Rodgers,[2] it was proved as a matter of fact that both parties actually had in view the contingency that performance might not be permitted by the railroad company. Then why did they not expressly provide that such action by the railroad company would operate as a discharge? Because the effect was so evident that the idea of inserting it as a condition did not even suggest itself. And so the contractor was excusable, not because of a presumption that the parties, had their attention been called to the fact, would have provided for it in the contract (their attention *was* called to the fact, and yet they did not provide for it), but because the contingency was so plainly "outside the contract" that reference to its effect was unnecessary.

It would seem that the same cannot fairly be said of Lovering *v.* Buck Mountain Coal Company,[3] and Buffalo

[1] 3 B. & S. 826.
[2] *Supra.*
[3] 54 Pa. St. 291.

and Lancaster Land Company *v.* Bellevue Land and Improvement Company,[1] and that the decisions in these cases, excusing failure to perform, cannot, under the application of the proposed rule, be supported. In the former case, the contract was for the sale and delivery of "Buck Mountain Coal," and the contingency which prevented its performance was the destruction by flood of certain navigation works, without the use of which it was impossible for the coal company to get its output to market. In the course of his opinion, Reed, J., said: "The Lehigh Coal and Navigation Works, therefore, became an indispensable and all-important link in their chain of transportation; a fact well known to all their customers, as well as the quality of their coal, and the mines from which it was taken. Of course all contracts made with the defendants were made in full view of these facts." In the absence of any evidence on the point, it seems rather strange that the court should say that as a matter of course, all persons who bought coal from this company were aware of the fact that there was only one way of reaching the market, and that that way involved the use of certain navigation works which might be destroyed by flood. But assuming such to be the case, is it not probable that the purchaser would expect the seller to assume the risk of such a contingency? Is it not quite possible that had attention been called to the fact, the purchaser would have refused to consent that the seller should be excused in case of destruction of the navigation works? And assuming that he would have consented, is it not practically certain that the parties, as reasonable men, would have deemed it of the highest importance that the stipulation should be expressely stated in the contract? If so, the seller should not, in the absence of stipulation, be excused.

In Buffalo and Lancaster Land Company *v.* Bellevue Land and Improvement Company,[2] the court says: "The whole contract and its purpose and object must be brought into view, and the language employed by the parties understood in a reasonable way. Neither party intended to be bound to do things that were impossible." But parties to

[1] *Supra.*

[2] *Supra.*

contracts frequently assume the risk of possibility of performance; and in the absence of express provision against that risk, it should be presumed that the risk is assumed, unless of such a nature that it obviously would not be assumed by reasonable men. In this particular case, it will be recalled, one party agreed to run electric cars at half-hour intervals, and no provision was made for the effect of unusually severe winter weather. It is probable that the contingency was not present in the minds of the parties when the contract was made. Had it been suggested, would they have inserted a clause excusing any failure, from that cause, to run cars at the stipulated intervals? Perhaps they would. But is it at all certain or obvious? Might they not have made some compromise on that point, such as a provision for compensation for any loss resulting from such a contingency? If so, to excuse the contractor entirely, in the absence of any stipulation, is to seriously modify the express terms of the contract, without any certainty that such modification is in accord with the intention of the parties, or with what would have been their intention, had the contingency been called to their notice. Since it cannot be said that interference of weather so manifestly excused failure to perform that the parties would have regarded it as superfluous to so provide, it should be presumed that they did not provide for it, because they did not intend it to be an excuse. In justice to the decision in this case, however, it should be noticed that the stipulation to the effect that cars should be run as often as once every half hour from seven A. M. to eight P. M. each day, was followed by the words "as such street railways are usually run." Just what was intended to be the significance of this phrase it is impossible to determine. The court regarded it as giving additional support to its decision excusing the breach, but the more reasonable construction would seem to be that the words do not qualify the stipulation as to time, but require, in addition, that the mode of operation conform to that of well-regulated street railway systems. It must be admitted that a refusal by the court to excuse the contractor in this case would have resulted in the imposition of a rather severe penalty—the acceptance of a reconveyance of the land and the restoration of the pur-

chase-price—and it is probable that this apparent hardship had some influence with the court. But the hardship would have been almost as great had the breach resulted from the negligence of the contractor, and it must be borne in mind, as has already been pointed out, that even though hardship occasionally result, it is sound policy to hold men to the express terms of their agreements.

Another New York case, the conclusion in which appears to be at least of doubtful propriety, is that of Booth *v.* The Spuyten Duyvil Rolling Mill Company,[1] the court having then gone to the other extreme and held a contractor to strict accountability for a failure to perform that was unavoidable, whereas there was strong reason for excusing him. The plaintiff having contracted to sell and deliver to a railroad company four hundred tons of rails, made of iron with steel caps, contracted with defendant to furnish the caps. By the terms of the agreement, defendant was "to make and deliver at their mill, on the Spuyten Duyvil Creek, Westchester County, one hundred tons of steel caps for rails, the same to be completed and delivered on or before April 1, 1868, with the privilege to deliver the whole or any part (not less than twenty tons at a time) during the months of January, February and March." On the tenth of March the rolling mill of the defendant was consumed by fire, and as a result the defendant was unable to perform within the stipulated time. In an action by the plaintiff for damages resulting from such failure to perform, it was held that the defendant was not excused by the burning of the mill, the court resting its decision upon two separate grounds: First, that the performance of the contract, by the exercise of due diligence, might have been completed before the mill was destroyed; second, that the contract did not require the caps to be made at that particular mill, and that performance might have been completed elsewhere. With reference to the first reason the court says: "A party cannot postpone the performance of such a contract to the last moment and then interpose an accident to excuse it. The defendant took the responsibility of the delay." This is manifestly absurd. At the time of the destruction of the mill there remained three

[1] 60 N. Y. 487.

weeks within which to manufacture the caps, and it does not appear that that period of time was too brief for the purpose. Surely, it did not devolve upon the defendant company to enter upon the performance immediately after the contract was made; it had the right to perform at any convenient time before April 1, and the fact that performance was not commenced on March 10, is not in itself the slightest evidence of neglect.

As to the second reason, the words of the court are as follows: "There was no physical or natural impossibility, inherent in the nature of the thing to be performed, upon which a condition that the mill should continue can be predicated. The article was to be manufactured and delivered, and whether by that particular machinery or in that mill would not be deemed material. True, the contract specifies the mill as the place, but it necessarily has no importance except as designating the place of delivery. For aught that appears, other machinery could have been substituted. The defendant agreed to furnish a certain manufactured article by a specific day, and it cannot be excused by an accident, even if it prevented performance." If the court is right in saying that the contract was for the manufacture of caps unconditionally and without reference to place of manufacture, the decision cannot be questioned. In that form the case strongly resembles that of Turner *v.* Goldsmith,[1] in which the plaintiff having been employed by contract in writing, for a period of five years to sell goods "manufactured or sold" by the defendant, and the defendant's factory having been destroyed by fire after about two years, the court held that defendant was not thereby excused from fulfilling his agreement, Lord Justice Kay saying: "If it had been shown that not only the manufactory, but the business of the defendant had been destroyed by *vis major*, without any default of the defendant, I think that the plaintiff could not recover. But there is no proof that it is impossible for the defendant to carry on business in articles of the nature mentioned in the agreement." Such a construction of the contract in the New York case, however, seems hardly justifiable. The defendant, presumably, owned only the one mill, and the language of the agree-

[1] 1 Q. B. D. 544.

ment makes it very clear that the parties contemplated that the goods were to be there manufactured; so that the case seems to be more strikingly analogous to Howell *v.* Coupland,[1] where the contract was for the sale of potatoes "to be grown on land belonging to defendant in Whaplode," and the later New York case of Stewart *v.* Stone,[2] where the defendant, having agreed to receive plaintiff's milk at his factory, make from it butter and cheese and sell the product, was held to be excused from performance by the destruction of the factory. In Howell *v.* Coupland the contract became impossible of performance because the land specified did not yield a sufficient quantity of potatoes; in the two New York cases because the factory specified was destroyed. All three are conceded to be very close cases, but it is believed that the English and the later New York decisions are to be preferred; that performance of the contract was in each case so obviously dependent upon a certain state of affairs that it would have appeared superfluous to provide that the parties should be excused in case that state of affairs should cease to exist.

Similar to the cases just considered, and difficult to distinguish from them, is Anderson *v.* May.[3] There the contract was that of a seed grower to sell and deliver certain quantities of specified kinds of beans. The contract was proved by letters passing between the parties, from which it fairly appears that the beans were to be grown by plaintiff, but not on any particular land. As an excuse for not delivering the entire quantity the seed grower relied on proof of the fact that an early, unexpected frost had injured his crop to such an extent as to make delivery impossible. The court held that he was not excused, citing Howell *v.* Coupland [4] as a case in which the exception had been extended further than in any other, and adding: "Without intimating whether we would follow that decision in a similar case, we will say that the case is unlike this in that in this case the plaintiff was not limited or restricted to any particular land. It was not an undertaking to sell and de-

[1] *Supra.*
[2] 127 N. Y. 500.
[3] 50 Minn. 280.
[4] *Supra.*

liver part of a specific crop, but a general undertaking to raise, sell and deliver the specified quantity of beans." In this view of the case it rests upon the same ground as cases of the class represented by Ashman *v.* Cox.[1] There the defendant sold to plaintiff two hundred and fifty bales of Manila hemp, shipment to be made from a port or ports in the Philippine Islands by sailer or sailers between May 1 and July 31, 1898, the agreement containing a clause that if the goods did not arrive from loss of vessel or other unavoidable cause the contract was to be void. In consequence of the Spanish-American war it was in a business sense impossible for defendant to ship hemp by sailer between the specified dates, but it was held that the failure was not thereby excused. The court construed the express clause "loss of vessel or other unavoidable cause" to apply only to goods actually shipped, and declared that there was no implied condition in the contract as to impossibility of shipment resulting from war, but that the defendants had taken upon themselves the absolute responsibility to deliver the hemp according to the express terms of the agreement. Tested by our proposed rule, the decision in this case is undoubtedly correct, as it is by no means so obvious that the obligation of the contract depended upon the non-occurrence of the event which made it impossible of performance that the insertion of a provision to that effect would have been regarded as superfluous.

There are a number of cases in which relief has been sought from the obligation of contracts for personal services, not on account of death or illness, but because of the danger of physical harm entailed in an attempt to perform. Thus, in Lakeman *v.* Pollard,[2] a laborer in a mill claimed that he was justified in quitting work because of the prevalence of cholera in the vicinity of the mills, and it was held that if the jury found that it was in reality unsafe for him to remain at work, the breach was excusable. The same is doubtless true in case a man quits work because of danger of physical injury from strikers.[3] Such cases may readily be assimilated to those in which impossibility results from

[1] [1899] 1 Q. B. D. 439.
[2] 43 Me. 463.
[3] Walsh *v.* Fisher, 102 Wis. 172.

actual illness or physical injury, for under no circumstances should a man be expected "to daily carry his life in his hands." That they are properly decided under our proposition, need not be demonstrated.[1]

Many other interesting cases in which the question of impossibility has arisen may be found,[2] but it is believed that those already discussed amply establish the unsatisfactory nature of the rules heretofore generally accepted, and the consequent rather uncertain state of the law. Owing to the fact that there are so many cases in which the equities between the parties are remarkably balanced, and to the further fact that in many instances it seems almost impossible logically to differentiate cases between which one intuitively feels that there is a distinction, absolute uniformity in the decisions is practically unattainable. But it is believed that the rule that has been suggested herein and experimentally applied to some of the adjudged cases, would have a considerable tendency to diminish confusion, and would be in far greater accord with the cases already decided and with equitable principles, than the rules which are now supposed to state the law.

FREDERIC C. WOODWARD.

[1] See also Dewey *v.* Union School District, 43 Mich. 480, and McKay *v.* Barnett, 21 Utah, 239, holding that the closing of schools by reason of epidemic of contagious disease does not make performance by School Board of contract with teacher impossible, and does not excuse failure to pay his wages.

[2] See Nicol *v.* Fitch, 115 Mich. 15; Board of Education *v.* Townsend, 63 Ohio St. 514; Hall *v.* School District, 24 Mo. App. 213; Herter *v.* Mullen, 159 N. Y. 44; Shear *v.* Wright, 60 Mich. 159; Allen *v.* Baker, 86 N. C. 91.